(2)

No. 95-1273

Supreme Court, U.S.
FILED
MAR 13 1996
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LARRY ROCKEFELLER; HOLACE MORANCI; NEIL MORANCI; DONNA MORANCI; MARY PARRISH; LUGENIA GORDON; HELEN DALLEY; BETSY WEBSTER; BETSY M. BLATTMACHR; NANCY BURNER; CORNELIUS P. DUGAN; and STEVE FORBES,

Petitioners,

v.

WILLIAM POWERS, Chairman, New York Republican State Committee; NEW YORK REPUBLICAN STATE COMMITTEE; NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

JAN WITOLD BARAN
Counsel of Record
MICHAEL E. TONER
KEVIN J. MARTIN
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000
Attorneys for Respondents New York Republican State Committee and William D. Powers as Chairman

Of Counsel
JEFFREY T. BULEY
General Counsel, New York Republican State Committee
315 State Street
Albany, NY 12210
(518) 462-2601

March 13, 1996

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

30 pp

PARTIES TO THE PROCEEDING

The plaintiffs are Larry Rockefeller, Holace Moranci, Neil Moranci, Donna Moranci, Mary Parrish, Lugenia Gordon, Helen Dalley, Betsy Webster, Betsy R. Blattmach, Nancy Burner, and Cornelius P. Dugan. Steve Forbes, as an individual and in his capacity as a candidate for President, is a plaintiff-intervenor.

The defendants are William D. Powers, Chairman, New York Republican State Committee; New York Republican State Committee; New York State Board of Elections; Owen T. Smith, Carol Berman, Evelyn J. Aquila, and Helena Moses Donohue, Commissioners, New York State Board of Elections; New York City Board of Elections; Douglas Kellner, Vincent Cuttita, Paul Mejias, Vincent J. Velella, Weyman A. Carey, Ronald J. D'angelo, Seymour Sheldon, Kathleen Wagner, Gertrude Strohm, and Ferinand Marchi, Commissioners, New York City Board of Elections; Erie County Board of Elections; Roger Blackwell and Ralph Mohr, Commissioners, Erie County Board of Elections; Nassau County Board of Elections; Suffolk County Board of Elections; Gerald Edelstein and Gerald Berger, Commissioners, Suffolk County Board of Elections; Monroe County Board of Elections; M. Betsey Relin and Ronald J. Starkweather, Commissioners, Monroe County Board of Elections.

TABLE OF CONTENTS

	Page
PARTIES TO THE PROCEEDING	i
TABLE OF AUTHORITIES	v
OPINIONS AND ORDERS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
COUNTER STATEMENT OF THE CASE	3
A. Republican Party Structure and Organization	4
B. The National Republican Party's Delegate-Selection Rules	4
C. Development of the State Party's Delegate-Selection Rule 24	5
D. District Court Proceedings	8
E. Court of Appeals Proceedings	9
SUMMARY OF ARGUMENT	11
REASONS FOR NOT GRANTING THE WRIT	12
I. PLAINTIFFS' CHALLENGE TO THE REPUBLICAN PARTY'S STANDARDS AND PROCEDURES FOR CHOOSING ITS CONVENTION DELEGATES IS NOT JUSTICIABLE	12
II. IF EQUAL PROTECTION JURISPRUDENCE APPLIES, STATE PARTY RULE 24 HAS A RATIONAL BASIS AND THEREFORE SATISFIES THE APPROPRIATE STANDARD OF REVIEW	13

TABLE OF CONTENTS—Continued

Page

A. As Party Rule 24 Does Not Severely Burden Any Fundamental Right, Strict Scrutiny Does Not Apply 13

B. Rule 24 Is Clearly Reasonable and Easily Passes Rational Basis Review 17

C. The State Party's First Amendment Associational Rights Compelled New York State to Defer to the Party's Delegate-Selection Rules.. 20

III. THE DISTRICT COURT'S "REMEDY" IN THIS CASE MAKES CLEAR THAT JUDICIAL REVIEW OF A POLITICAL PARTY'S INTERNAL DELEGATE-SELECTION RULES IS NOT JUDICIALLY MANAGEABLE 22

CONCLUSION 24

TABLE OF AUTHORITIES

Cases Page

Anderson v. Celebrezze, 460 U.S. 780 (1983) 13, 18
Bullock v. Carter, 405 U.S. 134 (1972) 15
Burdick v. Takushi, 504 U.S. 428 (1992) 13, 14
Chapman v. Meier, 420 U.S. 1 (1975) 23
Democratic Party of U.S. v. Wisconsin ex rel. LaFollette, 450 U.S. 107 (1981) 12, 20
Eu v. San Francisco County Democratic Comm., 489 U.S. 214 (1988) 12, 20, 21
Growe v. Emison, 507 U.S. 25 (1993) 23
Hewes v. Abrams, 718 F. Supp. 163 (S.D.N.Y.), *aff'd*, 884 F.2d 74 (2d Cir. 1989) 14, 16, 17, 23
Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) ..... *passim*
Jenness v. Fortson, 403 U.S. 431 (1971) 17, 18
LaRouche v. Kezer, 990 F.2d 36 (2d Cir. 1993) 13
Mahon v. Abrams, No. 88-1745 (S.D.N.Y. Mar. 21, 1988), *aff'd*, 847 F.2d 835 (2d Cir. 1988) 14, 17, 21
McDonald v. Board of Elections, 394 U.S. 802 (1969) 17
McGee v. Board of Elections, 669 F. Supp. 73 (S.D.N.Y. 1987) 13, 14
Milliken v. Bradley, 418 U.S. 717 (1974) 23
Munro v. Socialist Workers Party, 479 U.S. 189 (1986) 17, 18
New Orleans v. Dukes, 427 U.S. 297 (1976) 17
Norman v. Reed, 502 U.S. 279 (1993) 13
Rockefeller v. Powers, 909 F. Supp. 863 (E.D.N.Y.), *rev'd*, 74 F.3d 1367 (2d Cir. 1995) ..... *passim*
Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) 20, 21
Wymbs v. Republican State Executive Comm., 719 F.2d 1072 (11th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984) 23

Statutes

28 C.F.R. § 51.52(a) 14
28 U.S.C. § 1254(1) (1994) 2
42 U.S.C. § 1973 (1994) 13
New York Sessions Law Chapter 586 (1995) ..... *passim*
New York Election Law § 6-136 (1994) ..... *passim*

TABLE OF AUTHORITIES—Continued

Miscellaneous Page

Congressional Quarterly's Politics in America 1994: The 103rd Congress (1994)..... 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1273

LARRY ROCKEFELLER; HOLACE MORANCI; NEIL MORANCI; DONNA MORANCI; MARY PARRISH; LUGENIA GORDON; HELEN DALLEY; BETSY WEBSTER; BETSY M. BLATTMACHR; NANCY BURNER; CORNELIUS P. DUGAN; and STEVE FORBES,

Petitioners,

v.

WILLIAM POWERS, Chairman, New York Republican State Committee; NEW YORK REPUBLICAN STATE COMMITTEE; NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

Respondents New York Republican State Committee and its Chairman William D. Powers (collectively "State Party" or "Party") respectfully request that this Court deny the petition for a writ of certiorari on the grounds asserted by petitioners and affirm the Court of Appeals' judgment. Were the Court to grant certiorari, it should do so on the ground that this matter is non-justiciable as respondents show in their cross-petition for certiorari in this case filed on March 13, 1996.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals vacating the district court's preliminary injunction was issued January 18, 1996 and is reported officially at 74 F.3d 1367 (2nd Cir.); a copy of the decision is also reprinted at Appendix ("App.") 3a-37a of the plaintiffs' petition for writ of certiorari in this case. The memorandum of decision of the United States District Court for the Eastern District of New York is reported officially at 909 F. Supp. 863 (E.D.N.Y.) and is reproduced at App. 38a-57a.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment in this case on December 21, 1995, and issued an opinion on January 18, 1996. The petition for a writ of certiorari was filed on February 12, 1996. This Court has jurisdiction under 28 U.S.C. § 1254 (1) (1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section one of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

> abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutes involved in this case are Chapter 586(2) of the Laws of New York, and New York Election Law § 6-136, which are reproduced respectively at App. 66a-69a & 70a-81a.

This case also involves State Party Rule 24, which provides that:

> The selection of delegates and alternate delegates to [the Republican] National Convention shall be governed by the Rules of the Republican Party (National), the Call for the National Convention, the Rules of the New York Republican State Committee and New York State Election Law. . . . Candidates for the positions of delegate and alternate delegate shall qualify for the ballot of the primary election pursuant to the designating petition process delineated in Articles two (2) and six (6) of the New York State Election Law.

COUNTER STATEMENT OF THE CASE

Petitioners ask this Court to grant certiorari to review a panel decision of the United States Court of Appeals for the Second Circuit rejecting an equal protection challenge to the State Party's duly-adopted, non-discriminatory rules for selecting delegates to the Republican National Convention. Although the court of appeals should have disposed of petitioners' challenge on the ground that this intra-party dispute is non-justiciable, the panel's ruling that rational basis review applies and that the State Party's rules are clearly rational is consistent with this Court's precedent and should not be disturbed.

A. Republican Party Structure and Organization.

The Republican Party reconstitutes itself every four years through the selection of delegates to the Republican National Convention. When the Republican National Convention is in session, it is the highest authority in the Republican Party. *See* Powers Nov. 20, 1995 Affidavit in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiffs' Motion for Preliminary Injunction at ¶ 2. One important task that delegates to the Republican National Convention perform is nominating the Party's presidential and vice-presidential candidates. However, the delegates also write the Party platform, confirm delegate credentials, adjudicate delegate challenges, adopt Party rules, and otherwise provide for Party governance. *See* The Rules of the Republican Party: 1992 Republican National Convention, Attached in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiffs' Motion for Preliminary Injunction. When the Republican National Convention is in session, it *is* the National Republican Party.

B. The National Republican Party's Delegate-Selection Rules.

Since 1972, the delegates to the National Republican Convention have approved a rule requiring state parties to select three delegates to the convention from each congressional district in their state. *See* National Republican Party Rule 31(a)(2); Powers Nov. 20, 1995 Affidavit at ¶¶ 4-5. Delegates selected on this basis constitute the vast majority of the delegates to the Republican National Convention. *Id.* As a condition for having their delegates seated at the National Convention, all state Republican parties are required to conduct their delegate-selection processes consistent with National Republican Party Rules. *See* National Republican Party Rule 32(a)(2).

These delegate-selection requirements reflect several collective political judgments of the Republican Party. First,

the Republican Party has decided that the National Convention should be made up of delegates who reflect the diversity of the states and territories they represent; a congressional-district method of election was designed to ensure this goal. *See* Powers Nov. 20, 1995 Affidavit at ¶ 4. Second, the Republican Party believes that selecting convention delegates from every congressional district in the country makes it more likely that the delegates collectively will nominate a presidential candidate who can gain broad public support in the general election. *Id.* at ¶¶ 6-7. Finally, by requiring that convention delegates be selected from all 435 congressional districts, the Republican Party has sought to provide the broadest possible participation of party members in the candidate-selection process. *Id.* at ¶ 5.

C. Development of the State Party's Delegate-Selection Rule 24.

State Republican committees are responsible for establishing procedures and standards for implementing delegate selection within the national Party's standards. As the petitioners correctly point out, the New York legislature has "attempted to codify each major party's preferred method of organizing a Presidential primary." Petition for Writ of Certiorari at 5-6. This law explicitly defers to political parties and allows parties to establish their own standards for access to the primary ballot.[1]

Through Party Rule 24, the State Party collectively decided to incorporate the New York Election Law ("NYEL") petition requirements into its party rules. *See* Powers Nov. 20, 1995 Affidavit at ¶¶ 7 & 10. Under State Party Rule 24 and NYEL § 6-136, each slate of candidates for delegate or alternate delegate in each district must file a designating petiton containing the sig-

[1] *See* New York Sessions Law Chapter 586 (1995), App. 70a-81a (providing that political parties may choose the delegate-selection rules that will apply to their primaries).

natures of 1250 enrolled Republicans in their districts, provided that no slate must obtain signatures from more than 5% of the registered Republicans in the district. NYEL § 6-136, App. 66a-69a.[2] The State Party believes that prospective delegate slates have shown that they possess a significant modicum of support if they are able to obtain 1250 signatures, regardless of how many signatures potentially are available. However, to assure that an ample pool of Republican voters is available, no delegate slate is required to obtain signatures from more than 5% of the Republicans in a congressional district.

The State Party chose these delegate-selection rules to ensure that prospective delegate slates display a significant modicum of support before they appear on the Republican Party primary ballot. In addition, rather than choosing a primary process in which a delegate candidate can get on the ballot merely by paying a filing fee, the State Party decided to have a primary which fairly tested a candidate's organizational strength and competence as well as his or her ability to cultivate grass-roots support throughout New York State. *See* Buley Nov. 20, 1995 Affidavit in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiffs' Motion for Preliminary Injunction at ¶ 8; Powers Nov. 20, 1995 Affidavit at ¶ 7.[3]

The State Party is aware that the burden of obtaining the necessary signatures is not the same in all districts. It

---

[2] Under New York law, the 1250 or 5% requirement also governs congressional primary elections. NYEL § 6-136(2)(g), App. 67a.

[3] The State Party has used these delegate-selection rules in its presidential primary for over 20 years. In 1992, due to a pending reapportionment, the RNC exempted the State Party from the three-delegate-per-district rule and allowed it to allocate two delegates to each district. However, once the 1992 reapportionment was completed, the State Party returned to the current rules. *See* Memorandum of Law of Defendants William D. Powers and New York Republican State Committee in Opposition to Plaintiffs' Motion for a Preliminary Injunction and in Support of Their Motion to Dismiss All Claims at 2-3 n.2.

knows, for example, that obtaining signatures in rural districts is more difficult than in urban districts, because the voters are dispersed. *See, e.g.*, Congressional Quarterly's Politics in America 1994: The 103rd Congress at 1015, 1089 (1994) (detailing the "sprawling" twenty-fourth congressional district that extends from the eastern border of Lake Ontario to the Vermont border, and includes the Adirondack Park). On the other hand, many rural districts in New York State have a high proportion of Republicans. *See, e.g.*, Congressional Districts 24, 25, 26, and 27 in "New York State Board of Elections Enrollment By Congressional District April 95," Exhibit A to the Affirmation of Burt Neuborne in Support of Plaintiffs' Motion for Preliminary Injunction. As the trial court found, however, the requirement is not excessive in any district. *See* Nov. 27, 1995 Hearing Tr. at 11-12. In addition, the Party's delegate-selection process has proven remarkably effective in identifying candidates with broad appeal. Indeed, four of the last five winners of the New York Primary have gone on to win the Republican nomination. In addition, Republican Party leaders believe that the State Party's recent electoral success in New York is attributable to the strong grass-roots support for the Party that the petition process engenders. *See* Powers Nov. 20, 1995 Affidavit at ¶ 12.[4]

---

[4] It should be noted that State Party members are given numerous opportunities to propose modifications to the Party's delegate-selection rules. In fact, at least one of the petitioners in this action—Lugenia Gordon—has repeatedly been permitted to propose modifications to the National Republican Party delegate-selection rules, but Ms. Gordon has been unable to persuade her fellow Republicans to change the rules. *See* State Party Dec. 8, 1995 Appeals Brief at 5. Having failed to persuade her fellow Republicans, Ms. Gordon and the other petitioners essentially seek to substitute their own judgment for that of the majority of their party.

D. District Court Proceedings.

On November 3, 1995, 11 registered Republicans ("plaintiffs" or "petitioners") brought suit in the United States District Court for the Eastern District of New York against the State Party and its Chairman William D. Powers, the Republican National Committee, the New York State Board of Elections, and a number of state and local election officials. Plaintiffs' amended complaint asserted various claims, including a claim that State Party Rule 24, New York Sessions Laws Chapter 586, and NYEL § 6-136 as applied violated the Equal Protection Clause of the Fourteenth Amendment. The plaintiffs' essential contention was that the Party's rules discriminated against districts with low Republican enrollments—which are located primarily in urban areas—while making it easier to qualify for the ballot in high-Republican districts.

On December 1, 1995, the district court ruled that the State Party's delegate-selection rules violated equal protection. The district court issued a preliminary injunction barring the State Party from using its rules in the March 7, 1996, New York presidential primary and barring New York election officials from enforcing state statutes that implemented the Party's rules. App. 63a-65a. The district court subsequently issued a memorandum opinion and order. App. 38a-57a.

In granting the preliminary injunction, the trial court found that the absolute burden imposed by Rule 24 is reasonable for all districts, ruling that the Party could impose a flat 5% requirement across the board. *See* 11/27/95 Hearing Tr. at 2.[5] The court concluded, however, that the equal protection clause compels the Party to fine-tune the Rule to require signatures from approximately the same percentage of Republicans in each district. Because the requirement of 1250 signatures works

---

[5] Rule 24 never requires the signatures of more than 5% of the registered Republicans in any congressional district.

out to 1.41% of the Republicans in the majority of districts, the district court mandated that the 1.41% standard apply in all districts except for those in which 1250 signatures comprises a lower percentage.

The trial court made no finding that delegates within a district face unequal burdens vis-a-vis one another. Nor was there any finding that potential presidential candidates faced unequal treatment. To the contrary, *all delegates within a given district must meet the same standard.* Instead, the court's professed concern was that "independent" members of the Republican Party in districts with fewer registered Republicans might have less opportunity to vote for delegates pledged to candidates with limited party support than they would have if they lived in a district with a large number of registered Republicans. *See* 11/27/95 Hearing Tr. at 7-8. The court found this supposed differential burden based solely on the assumption that the key factor controlling the difficulty of obtaining signatures is the number of registered Republicans in a given district, giving no consideration to other demographic or geographic factors.

E. Court of Appeals Proceedings.

On December 21, 1995, a panel of the United States Court of Appeals for the Second Circuit heard the State Party's expedited appeal and, ruling from the bench, summarily reversed the trial court and vacated the preliminary injunction. On January 18, 1996, the panel issued a written opinion. App. 3a-37a.[6]

---

[6] After the Second Circuit vacated its first injunction, the district court ruled that the State Party's delegate rules violated the First Amendment on February 21, 1996, issuing a second preliminary injunction enjoining the Party from using its rules in the March 7 primary. On February 29, 1996, the Second Circuit affirmed. Because the New York primary was just days away, and to avoid creating further electoral confusion, the State Party did not seek emergency relief from this Court prior to the primary. In order to vindicate and protect its constitutional rights, however, the State Party plans to file a petition for certiorari regarding the second injunction.

The panel ruled that in order for the State Party's delegate-selection rules to trigger strict scrutiny under the Fourteenth Amendment, the alleged discriminatory burden on plaintiffs' right to vote would have to be at least "substantial," if not actually "severe." App. 24a-25a n.16. The panel then found that even in those districts in which the signatures of 5% of the registered Republicans was required, no substantial or severe burden on ballot access existed. App. 27a-33a; 34a. Rather, the court concluded that the State Party and New York State had

> determined, consistent with the Supreme Court's holding in *Jenness*, 403 U.S. at 422, that requiring candidates to submit petitions signed by five percent of the district's enrolled Republicans is consistent with the goal of weeding out candidates who do not have a 'modicum of suport.'

App. 35a.

Accordingly, the panel applied rational-basis scrutiny to the State Party's delegate rules and found the rules to be "rational." App. 35a. The panel found that the State Party had determined that applying a 5% requirement across-the-board in all districts "would impose an unnecessary burden in districts with many Republicans (like the Third), *where an unmitigated five percent requirement would require 7905 signatures.*" *Id.* (emphasis added) The panel found the State Party's 1250 or 5% signature requirement to be a rational

> effort to balance two goals—restricting ballot access to candidates who show some percentage of support, and providing a safety valve when the across-the-board percentage formula forces candidates in certain districts to collect more signatures than a number sufficient to show a modicum of support.

Id.

SUMMARY OF ARGUMENT

Plaintiffs are asking the federal courts to referee an intra-party dispute over how persons who have voluntarily associated with one another for political purposes should select party delegates to their national convention. Plaintiffs cast themselves as independent of the mainstream Republican Party. Instead of working within the State Party—or simply leaving the Party—they have chosen to use a federal district court to try to effectuate changes to Party delegate-selection rules that they were unable to obtain from within the Party. This Court has repeatedly emphasized, however, that the associational rights of political parties are protected from outside state and judicial interference absent racial discrimination—which is not present here. Moreover, courts and states should especially defer to a party's judgment regarding appropriate ballot-access requirements where, as here, the party is choosing delegates for party office. First Amendment associational rights are at their peak when political parties decide such internal matters as the appropriate process for selecting National Convention delegates.

Not only did the district court inject itself into this inherently political dispute, it also erroneously held the State Party's delegate-selection rules to the strictest standard of judicial review. The Second Circuit appropriately applied rational basis review, concluding that not all ballot restrictions are subject to heightened scrutiny, especially where, as here, they involve non-discriminatory ballot- access requirements for the election of convention delegates. Thus, to the extent the State Party's delegate-selection rules are justiciable, only rational basis review would apply. Such review is fully satisfied here by the Party's compelling interest in making sure that candidates to Party election have a significant modicum of support before being placed on the ballot. In addition, these delegate-selection rules are a reasonable means of testing a candidate's organizational strength and ability to generate grass-roots support.

Finally, even if fine tuning of Rule 24 were constitutionally required, federal courts are not the appropriate tuners. The fact that no party to this case agreed with the ballot-access standard imposed by the district court highlights the inherently political nature of the delegate-selection process. Thus, any standard imposed by a district court would be innately arbitrary and subject to challenge.

REASONS FOR NOT GRANTING THE WRIT

I. PLAINTIFFS' CHALLENGE TO THE REPUBLICAN PARTY'S STANDARDS AND PROCEDURES FOR CHOOSING ITS CONVENTION DELEGATES IS NOT JUSTICIABLE.

Both the district court and the Second Circuit failed to recognize that the resolution of such inherently political issues as the appropriate method for selecting delegates to the national convention is simply not justiciable. This Court has made clear that a core component of the freedom of association protected by the First Amendment is "a political party's decisions about the identity of and *the process for electing,* its leaders." *Eu v. San Francisco County Democratic Comm.*, 489 U.S. 214, 229 (1988) (emphasis added); *see also Democratic Party of U.S. v. Wisconsin ex rel. LaFollette,* 450 U.S. 107, 124 (1981) ("[a] political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution"). The Second Circuit should have vacated the district court's preliminary injunction on this ground alone. For a fuller discussion of the non-justiciability of the State Party's rules relating to delegate selection, *see* the State Party's Cross-Petition for Certiorari filed on March 13, 1996.

II. IF EQUAL PROTECTION JURISPRUDENCE APPLIES, STATE PARTY RULE 24 HAS A RATIONAL BASIS AND THEREFORE SATISFIES THE APPROPRIATE STANDARD OF REVIEW.

A. As Party Rule 24 Does Not Severely Burden Any Fundamental Right, Strict Scrutiny Does Not Apply.

The Second Circuit aptly concluded that strict scrutiny does not apply to the delegate-selection process at issue here, as the right to vote has *not* been "significantly" burdened. *Rockefeller v. Powers*, App. 26. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (when an election requirement imposes only "reasonable, nondiscriminatory restrictions," the state must generally meet only the "slight" burden of showing that the requirement serves legitimate interests).[7] *See also Norman v. Reed*, 502 U.S. 279, 289 (1993) ("severe" burdens on the right to form new political parties merit strict scrutiny). Courts invoke strict scrutiny only upon a showing of "invidious discrimination" or a "preclusion of the right to vote." *McGee v. Board of Elections*, 669 F. Supp. 73, 77 (S.D.N.Y. 1987). As such a showing has not, and cannot, be demonstrated here, strict scrutiny should not apply.[8]

---

[7] Of course, states have a "compelling interest" in structuring elections to "avoid[] confusion, deception, and even frustration of the democratic process . . . ," *Jenness v. Fortson*, 403 U.S. 431, 442 (1971), and are therefore allowed to narrow the field of candidates with "reasonable, nondiscriminatory restrictions" designed to demonstrate sufficient grass-root support to qualify for the ballot. *See LaRouche v. Kezer*, 990 F.2d 36, 40 (2d Cir. 1993) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

[8] Moreover, because New York contains three congressional districts subject to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, the State Party submitted Rule 24 to the Department of Justice in 1991 for pre-clearance. In deciding whether to pre-clear election practices, the Department of Justice determines "[w]hether the submitted change has the purpose or will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority

The Second Circuit easily determined that the requirements of Rule 24 do not impose a 'severe" burden on voters, concluding that "*the disparities* created by the five percent or 1250 rule do not even 'significantly' burden the plaintiffs' fundamental right to vote. . . ." *Rockefeller v. Powers,* App. 26a n.16.

Moreover, the requirements of Party Rule 24 parallel those requirements that govern candidates access to the ballot in many other New York elections—such as congressional primary elections. Courts have repeatedly applied rational basis analysis to these statutory requirements. *See Hewes v. Abrams,* 718 F. Supp. 163 (S.D.N.Y.), *aff'd,* 884 F.2d 74 (2d Cir. 1989); *Mahon v. Abrams,* No. 88-1745 (S.D.N.Y. Mar. 21, 1988); *aff'd without opinion,* 847 F.2d 825 (2d Cir. 1988); *McGee,* 669 F. Supp. 73 (S.D.N.Y. 1987).[9]

In addition, the Second Circuit independently concluded that there are no numerical discrepancies that could severely burden any candidate because "there will be thirty-one elections on March 7[, 1996]." *Rockefeller v. Powers,* App. 29a. Thus, to the extent that any requirement imposes a barrier to a candidate's access to the

---

group." 28 C.F.R. § 51.52(a). Finding no discriminatory purpose or effect, on January 8, 1993, the Department of Justice pre-cleared State Party Rule 24. *See* Department of Justice Pre-Clearance Letter, Attached to Memorandum of Law of Defendants William D. Powers and New York Republican State Committee in Opposition to Plaintiffs' Motion for a Preliminary Injunction and in Support of Their Motion to Dismiss All Claims.

[9] The Southern District explained in *McGee* that "because primaries are a remedial measure designed to increase voter participation in the selection process and are not found everywhere, the main concern of the courts is that arbitrary and capricious classifications are avoided." *McGee,* 669 F. Supp. at 77 (citations omitted). Given the State Party's interest in requiring prospective delegate slates to show that they have a significant modicum of support and that presidential candidates have effective organizations that can generate grass-roots support, the Party's delegate-selection rules are certainly not arbitrary and capricious.

Republican primary ballot in a district, all candidates in that district face the same obstacle. *See, e.g., McGee*, 669 F. Supp. at 77 ("the equal protection claims of the plaintiffs may be easily disposed of because there is presented in this case no disparate treatment of participants in the primary election").

The trial court erroneously applied strict scrutiny when evaluating the Party's ballot-access requirements, relying heavily upon *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979). The Second Circuit recognized, however, that *Socialist Workers Party* only stands for the proposition that strict scrutiny applies to a ballot access discrepancy if it "significantly burdens [the voters'] fundamental right to vote or significantly impairs their ability to express political preferences." *Rockefeller v. Powers*, App. 26a.[10] That *Socialist Workers Party* must be read narrowly is confirmed by this Court's subsequent repeated admonitions that "the mere fact that a State's system creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.'" *Burdick v. Takushi*, 504 U.S. at 433 (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)).

---

[10] In addition, *Socialist Workers Party* is factually distinct. In that case, the Court applied strict scrutiny to a statutory requirement that new political parties and independent candidates collect numerically more signatures for access to the general election ballot in a mayoral contest than in an election for statewide office, even though the number of party enrollees citywide was much smaller than the number of enrollees statewide. Plaintiffs do not contend, nor does Rule 24 require, that numerically *more* signatures be collected to qualify for the primary ballot in districts with fewer Republicans. In fact, the opposite is true. In the 11th District, which has the fewest enrolled Republicans, Rule 24 requires only 5% or 590 signatures. *See* ¶ 7 of Affirmation of Burt Neuborne in Support of Plaintiffs' Motion for Preliminary Injunction. In congressional districts with more Republicans, 1250 signatures are required.

In short, this case shares no similarity with *Socialist Workers Party*.[11] Rather, as the Second Circuit noted, the case most analogous to this case is *Hewes v. Abrams*, in which the district court applied rational-basis review in evaluating the constitutionality of New York Election Law ("NYEL") § 6-136. In *Hewes*, a Right-to-Life Party candidate for mayor launched an equal protection challenge to NYEL § 6-136(2) because the signature requirement (5% or 10,000, whichever was less) had the effect of creating a disparity among candidates for mayor in the actual percentage of signatures required to qualify for the ballot. Because of party enrollment numbers, the candidates from the major parties were required to obtain 10,000 signatures, a figure below 5% of party enrollment, while the candidate for the Right-to-Life Party had to collect signatures from 5% of the party enrollees. The Southern District held that the signature requirements plainly serve important state interests and that varying the signature requirement with the size of the voter base is consistent with the equal protection clause. *Hewes v. Abrams*, 718 F. Supp. at 167. The Southern District concluded:

> A signature cap is thus a rational accommodation of these varying interests [that are implicated]. Indeed, courts have recognized that varying the size of signature requirements based on the size of the relevant

---

[11] In fact, even the relief in *Socialist Workers Party* runs counter to plaintiffs' theory. The remedy crafted in *Socialist Workers Party* to address disparate petition requirements for city and statewide office was a uniform 25,000 signature rule for *both* city and statewide office. *Id.* at 179. This Court fashioned such a remedy even though voters available to sign petitions for ballot access in Chicago are only a fraction of the voters available in the state as a whole. According to the 1980 census, the population of Illinois was about four times that of Chicago (11.5 million versus 3 million). Thus, even in the context of strict scrutiny, the remedy in plaintiffs' key case required the same absolute number of signatures despite a substantial variance in the pool of persons eligible to sign.

> voter base is rational and thus perfectly consistent with the equal protection clause. *See Mahon v. Abrams,* 88 Civ. 1745 (S.D.N.Y. March 21, 1988) (LBS), *aff'd,* 847 F.2d 835 (2d Cir. 1988) (preliminary injunction denied on plaintiffs' equal protection claim [regarding] § 6-136(2) requiring signatures of 5% of party enrolled in a given district or 1,250 signatures, which ever is less, in order to name delegates to the Republican party convention).

Id. After rational basis review, the Second Circuit panel affirmed *per curiam* "substantially for the reasons stated by Judge Haight in his thorough opinion. . . ." *Hewes v. Abrams,* 884 F.2d at 75.

As the Second Circuit easily concluded, the requirements of Party Rule 24 do not impose a "severe" burden on voters and thus do not merit strict scrutiny.

B. Rule 24 Is Clearly Reasonable and Easily Passes Rational Basis Review.

The State Party's delegate-selection rules are clearly constitutional. Traditional equal protection review begins with a presumption of constitutional validity and requires the party challenging the rule to prove that no rational basis for the rule exists. *See McDonald v. Board of Elections,* 394 U.S. 802, 809 (1969). To uphold the rule, there must be only a rational relationship between it and legitimate interests. *New Orleans v. Dukes,* 427 U.S. 297, 303 (1976). Under this analysis, the plaintiff has the clear burden to establish that "no grounds can be conceived to justify [the rule]." *McDonald,* 394 U.S. at 809 (citations omitted).

The State Party's delegate-selection requirements clearly pass rational basis review. This Court has recognized time and again that states may condition ballot access upon a showing of a "significant modicum of support." *See Jenness v. Fortson,* 403 U.S. 431, 442 (1971) (upholding 5% requirement); *Munro v. Socialist Workers*

Party, 479 U.S. 189 (1986). Party Rule 24's 1250 or 5% signature requirement per congressional district is well within the limits that have been sustained in other cases,[12] and is a reasonably simple means of establishing a significant modicum of support. Moreover, since it is convention delegates that are being selected as party leaders, Party Rule 24 should receive even more deference than corresponding state ballot-access requirements. It is reasonable for the Party to require such delegate candidates to demonstrate a significant ability to organize support within their district. *See Anderson v. Celebrezze*, 460 U.S. 780, 799 n.9 (1983) (states have "the undoubted right to require candidates to make a showing of substantial support in order to qualify for a place on the ballot . . . .").

Petitioners contend, and the trial court found, that the variation Rule 24 permits in the percentage relationship between the required number of signatures and the pool of persons eligible to sign is irrational. However, this suggestion suffers from several independently fatal flaws.

First, plaintiffs' theory arbitrarily undermines the State Party's constitutionally protected right to decide what constitutes a significant modicum of support. If the Party were to require 2500 signatures (rather than 1250), with a 5% safety valve, the percentage variation that so concerns plaintiffs would be cut in half and the absolute burden would remain in a range that the district court found is clearly permissible. Yet, plaintiffs offer no reason why the State Party cannot decide that, if delegates

---

[12] A 5% signature requirement has been sustained in several cases. *See Jenness v. Fortson*, 403 U.S. 431, 442 (1971); *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). Rule 24 never requires more than 5% of the eligible persons to sign petition forms and in the vast majority of districts requires far less. In fact, the State Party's rules as applied require the signatures of 5% of a district's Republicans in only 6 of New York's 31 congressional districts. *Rockefeller v. Powers*, App. 10a n.6. In 19 of New York's 31 congressional districts, less than 1.5% is required, and in 8 districts, less than 1% is required. *Id.*

show the ability to obtain 1250 signatures, that is sufficient, regardless of the size of the pool of persons eligible to sign.

Second, there is no evidence that the difficulty of obtaining 1250 signatures is directly, or even primarily, proportional to the number of Republicans in a district. Certainly, the fact that Rule 24 provides a 5% safety valve in a few districts to guard against possible undue burdens cannot be cited as a concession that the percentage of Republicans is a generally accurate proxy for burden. The trial court's assumption that such a neat and clean relationship exists is wholly unsupported.

As the disparity in the percentage signature requirements does not significantly burden the right to vote, the State Party must only demonstrate that a rational basis exists for its delegate-selection rule.[13] The rational basis for Rule 24 is to limit ballot access to delegate candidates that can demonstrate a significant modicum of support, organizational skill, and grass-roots support. Even candidates for government office—as opposed to Party office—may be required to demonstrate such "a significant modicum of support." *Socialist Workers Party,* 440 U.S. at 185. Indeed, under strict scrutiny such a requirement has been recognized as serving *compelling* interests. *Id.* Party Rule 24 is eminently reasonable and readily survives rational basis review.

---

[13] This review assumes state action exists in the Party's choice of the delegate-selection rules. As the New York Attorney General stated below, however, the state of New York simply deferred to the State Party's rules because it determined that it would be unconstitutional not to do so:

> Mindful of the First Amendment associational rights of the parties, especially in light of emphatic pronouncements from the Supreme Court over the past 20 years, the New York Legislature would never presume to dictate to the parties how national convention delegates should be selected or allocated.

New York Attorney General Dec. 8, 1995 *Amicus Curiae* Appeals Brief at 7-8.

C. The State Party's First Amendment Associational Rights Compelled New York State to Defer to the Party's Delegate-Selection Rules.

The Second Circuit appropriately acknowledged that the elections at issue involve candidates for Party office—delegates to the Republican National Convention who will do more than cast a vote for the Presidential nominee; they will also "cast votes on platform issues and issues of party governance . . . [and] will vote at the convention on other issues as well." *Rockefeller v. Powers*, App. 30a. The district court preliminarily enjoined the State Party from implementing the procedures that the State Party collectively decided to use for the selection of delegates to the Republican National Convention. That injunction injected the federal courts directly into Party procedures. The district court failed to review the ballot-access requirement with due deference to the State Party's fundamental associational rights.

The state's power to regulate elections "does not justify, without more, the abridgment of fundamental rights, such as . . . the freedom of association." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986) (citation omitted). Freedom of association "encompasses a political party's decisions about the identity of, and the process for electing, its leaders." *Eu v. San Francisco County Democratic Comm.*, 489 U.S. at 229. Specifically,

> [a] political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution. And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.

Democratic Party of U.S. v. Wisconsin, 450 U.S. at 124. In light of these considerations, the courts have refused to officiate disputes between members of the same party

absent an overwhelming justification. *Id.* at 123-24 ("a State, or a court, may not constitutionally substitute its own judgment for that of [a political party"]). *See also Mahon v. Abrams*, 88 Civ. 1745 at 11 ("what is involved here is a political party primary, and particularly strong deference has been paid by the courts to the ability of a political party to determine [primary] procedures. . . .").

Thus, the State of New York not only had a rational basis, but indeed a duty, to accommodate the delegate-selection standards of the New York Republican Party. *See Tashjian*, 479 U.S. at 213-17; *Eu v. San Francisco*, 489 U.S. at 229-33. Such an affirmative duty to accommodate the State Party's duly-adopted delegate standards is sufficient to justify the action by the State that is at issue here. The equal protection clause does not constrain the Republican Party in setting its delegate-selection standards, and the First Amendment shields those standards from outside interference. Thus, the Party's delegate standards should be free of any judicial review, at least absent some compelling countervailing governmental interest such as preventing racial discrimination, which is not present here. Moreover, even if such a compelling interest were present, it would have to be balanced against the Party's own core First Amendment rights.

The district court here erroneously substituted its own views for the political judgments of the Republican Party without giving any deference to the Party's First Amendment interests. In so doing, the court intruded deeply into an area where, simply stated, it had no business. For this reason alone, the Second Circuit was correct in setting aside the district court's preliminary injunction.

III. THE DISTRICT COURT'S "REMEDY" IN THIS CASE MAKES CLEAR THAT JUDICIAL REVIEW OF A POLITICAL PARTY'S INTERNAL DELEGATE-SELECTION RULES IS NOT JUDICIALLY MANAGEABLE.

The State Party has enacted a rational rule that requires a constitutional demonstration of a significant modicum of support to qualify delegate slates for the New York presidential primary ballot. Although it expressly recognized that several possible rules would be constitutional, the district court arbitrarily adopted its own requirement.

The district court imposed a 1.41% or 1250 signature requirement in 16 of 31 congressional districts. The court alternatively held that (i) 5% everywhere would be constitutional (11/27/95 Hearing Tr. at 2), (ii) .5% would be constitutional, and (iii) its own 1.41% or 1250 formula is constitutional. Before the Court of Appeals, plaintiffs desired a .79% across the board standard. Such arbitrary distinctions fail rational basis review. *None* of these standards, moreover, is the requisite percentage adopted by the State Party.[14] As the New York Attorney General pointed out below in his brief *amicus curiae*, if allowed to stand, the district court's standard would lead to needless complications for years and would fail to solve any of Rule 24's perceived constitutional infirmities. New York Attorney General Dec. 8, 1995 *Amicus Curiae* Brief at 5. Federal courts are not com-

---

[14] The wide scope of permissible rules is underscored by the district court's recognition that even its own strict equal protection theory does not require exact proportionality. *Rockefeller v. Powers*, App. 54a ("I agree that once a state has selected a percentage that represents the appropriate modicum of support it may institute a cap to liberalize ballot access.") Thus, even if federal courts were competent to decide political issues concerning delegate selection to national conventions, the district court's formula leaves statistical disparity that does not comport with its strict reading of the equal protection clause.

petent to forge such complicated primary election rules. *See, e.g., Wymbs v. Republican State Executive Comm.*, 719 F.2d 1072, 1083 (11th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984) (district court remedy was "a policy decision that federal courts are ill equipped to make . . . .").

Nothing in the equal protection clause compels such a broad usurpation of the Party's right to enact and enforce constitutional delegate-selection rules. In fact, federalism concerns have led this Court to caution that, where several alternatives would satisfy the equal protection clause, the primary responsibility for establishing a constitutional plan belongs with the states, not the federal courts.[15] *See Growe v. Emison*, 507 U.S. 25, 33-35 (1993) (federal courts should have allowed state to develop reapportionment plan even though there might not be time for judicial review before the primary); *Chapman v. Meier*, 420 U.S. 1, 27 (1975) (reapportionment); *see also Milliken v. Bradley*, 418 U.S. 717, 744 (1974) ("the scope of the remedy is determined by the nature and extent of the constitutional violation"). The State Party should be entitled to no less deference.

Although there is no means, either through the courts, the legislature, or the Republican Party, to ensure that ballot-access burdens are exactly equalized, that is not constitutionally required and, indeed, is practically impossible. It is enough that the burden, as here, is reasonable and serves its intended purpose.

---

[15] Courts have also previously rejected challenges to NYEL § 6-136 that "would necessitate a substantial reworking of the electoral laws." *Hewes v. Abrams*, 718 F. Supp. at 165.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari on the grounds asserted by petitioners should be denied. Were the Court to grant certiorari, it should do so on the ground asserted by respondents in their cross-petition for certiorari in this case filed on March 13, 1996.

Respectfully submitted,

JAN WITOLD BARAN
Counsel of Record
MICHAEL E. TONER
KEVIN J. MARTIN
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000
Attorneys for Respondents New York Republican State Committee and William D. Powers as Chairman

Of Counsel
JEFFREY T. BULEY
General Counsel, New York Republican State Committee
315 State Street
Albany, NY 12210
(518) 462-2601

March 13, 1996